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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IN RE:
DARRELL RAY ATCHISON AND
ANOLA MARIE ATCHISON,

Debtors.

CHARLES E. JONES, TRUSTEE,

Petitioner,

v.

ANOLA MARIE ATCHISON,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a debtor's disclaimer of an inheritance, occurring within one year prior to the filing of a bankruptcy petition, is a "transfer of an interest of the debtor in property" which a bankruptcy trustee may avoid pursuant to the provisions of Section 548(a) of the Bankruptcy Code. (11 U.S.C. Sec. 548(a) (1990).)

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were: Anola Marie Atchison and Darrell Ray Atchison, debtors, Charles E. Jones, bankruptcy trustee, Anola Marie Atchison, William Kent Crawford, Individually and as Executor of the Estate of Don Crawford, deceased, Darrell Keith Atchison, Commerce Bank of St. Louis, N.A., and Debra Bedard.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Charles E. Jones, Trustee, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit in the Petition for Rehearing is unreported. (App., *infra*, at 1.) The opinion of the United States Court of Appeals for the Seventh Circuit (App.,*infra*, at 3-7) is reported at 925 F.2d 209 (7th Cir. 1991). The order of the United States District Court for the Southern District of Illinois, affirming the judgment of the bankruptcy court, is unreported (App., *infra*, at 8-20).

The memorandum and order of the United States Bankruptcy Court for the Southern District of Illinois (App., *infra*, at 21-38) is reported at 101 B.R. 556.

JURISDICTION

The court of appeals entered its judgment on February 15, 1991. Subsequently, on March 18, 1991, the court of appeals denied the petition for rehearing. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(50) of the 1990 Bankruptcy Code, 11 U.S.C. Sec. 101(50) provides:

> In this title --
> "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of debtor's equity of redemption.

Section 548(a) of the 1990 Bankruptcy Code, 11 U.S.C. Sec. 548(a), provides:

> (a) the trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --
>
> (1) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B) (i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with

> the debtor was an unreasonably small capital; or
>
> (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

Section 544(b) of the 1990 Bankruptcy Code, 11 U.S.C. Sec. 544(b) provides:

> The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title [11 U.S.C. Section 502] or that is not allowable only under section 502(e) of this title [11 U.S.C. Section 502(e)].

Section 541(a)(1) of the 1990 Bankruptcy Code, 11 U.S.C. Sec. 541(a)(1) provides:

> (a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS Sec. 301, 302, or 303] creates an estate. Such estate is comprised of all the flollwing property, wherever located and by whomever held:

> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

Section 727(a)(2)(A) of the 1990 Bankruptcy Code, 11 U.S.C. Section 727(a)(2)(A) provides:

> (a) The court shall grant the debtor a discharge, unless --
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title [11 U.S.C. Section 101 et seq.], has transferred, removed, destroyed, mutilated, or concealed . . .
>
> (A) property of the debtor, within one year before the date of the filing of the petition;

Chapter 59, paragraph 4 of the Illinois Revised Statutes provides:

Fraudulent Conveyances

> Every gift, grant, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder or defraud creditors or other persons, and every bond or other evidence of debt given, suit commenced or judgment entered, with like intent, shall be void as against creditors, purchasers and other persons.

Chapter 110 1/2, paragraph 4-13 of the Illinois Revised Statutes provides:

Effect of order admitting will to probate

> Every will when admitted to probate as provided by this Act is effective to transfer the real and personal estate of the testator bequeathed in that will.

Chapter 110 1/2, par. 2-7 of Illinois Revised Statutes is set out in the Appendix at page 39-48.

STATEMENT

On July 8, 1987, respondent, Anola Marie Atchison ("Debtor"), and her husband, Darrell Atchison, filed a joint chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Illinois, less than three months after she disclaimed an inheritance relinquishing any interest she had under the will to her children. On June 15, 1988, Charles Jones the appointed Trustee of the bankruptcy estate, filed a complaint to recover the disclaimed property.

The Trustee subsequently obtained leave of court to file a Second Amended Complaint. Although the Second Amended Complaint contains three counts, Count I, Count III and part of Count II were either dismissed by the court or conceded

by the parties. Only the remaining allegations in Count II are relevant to this Petition for Writ of Certiorari.

The relevant allegations of the Second Amended Complaint are as follows: On April 16, 1987, the Debtor executed a written disclaimer of all property and interests in property devised to her in her father's will. Pursuant to Illinois law, the inheritance passed to the Debtor's son and daughter, who are named as defendants in Count II.

The Second Amended Complaint also alleges that the disclaimer is a voidable transfer pursuant to Section 548 (11 U.S.C. Sec. 548) because the Debtor transferred her inheritance within one year of the filing of the bankruptcy petition with an actual intent to hinder, delay or defraud her creditors, and she

became insolvent as a result of such transfer. Count II requests that the court declare the disclaimer void and order the return of the inheritance to the bankruptcy estate.

On March 28, 1989, the Bankruptcy Court filed a Memorandum and Order granting the Debtor's motion to dismiss (App., *infra*, at 21-38). The Bankruptcy Court concluded that Section 2-7 prevented the property disclaimed by the Debtor from vesting in her or passing from her. Accordingly, the court held that the Debtor's disclaimer did not operate as a transfer of property. As a result, there was no fraudulent transfer.

On April 7, 1989, the Trustee filed a motion to alter or amend judgment and make additional findings of fact pursuant to Bankruptcy Rule 7052. The Bankruptcy

Court subsequently entered an order on July 10, 1989, denying the Trustee's motion and filed a memorandum and order which restated its conclusion that the disclaimer did not constitute a transfer of property under the Bankruptcy Code. *In Re Atchison, 101 B.R. 556 (Bankr. S.D. Ill. 1989)*

On July 9, 1989, the Trustee filed a timely Notice of Appeal to the United States District Court for the Southern District of Illinois. The district court entered an order on November 28, 1989, affirming the Bankruptcy Court's dismissal of Count II, holding that the Debtor had no interest to transfer "that would implicate section 548(a)" because when she executed the disclaimer prior to filing bankruptcy, she extinguished her interest in the devised property. (App., *infra*, at 8-20).

On December 15, 1989, the Trustee filed a timely Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The court of appeals entered an order on February 15, 1991, affirming the decision of the district court. The court concluded that the disclaimer did not constitute a transfer of an interest in property which the Trustee may avoid under Section 548(a) of the Bankruptcy Code. (App., *infra*, at 2-6). Subsequently on March 18, 1991, the Court of Appeals for the Seventh Circuit denied the Trustee's petition for rehearing. (App., *infra*, at 1.)

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

It is beyond peradventure that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law must yield. *Free v. Bland*, 369 U.S. 663 (1962). In addition, a federal statute which touches a field in which the federal interest is dominate must be assumed to preclude enforcement of state laws to the contrary. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

In this action, the Trustee seeks to set aside the Debtor's disclaimer of a devise as a fraudulent transfer pursuant to the terms of Section 548 of the Bankruptcy Code of 1978. (11 U.S.C. Sec. 548.) To determine whether a transfer was fraudulent under Section 548, the

Trustee must show that: (1) a transfer of an interest in debtor's property occurred; (2) the transfer occurred within one year of the date of filing the bankruptcy petition; and (3)(a) the transfer was made with actual intent to hinder, delay or defraud any entity to which the debtor was indebted at the time; or (b) the debtor received less than reasonably equivalent value in exchange for the transfer and the debtor was insolvent on the date of the transfer.

It is clear that Congress intended that a transfer occurring within one year of a bankruptcy be prohibited. However, under Illinois' Probate Code, a disclaimer creates the unusual circumstances of providing that the property right which was transferred

never existed. Accordingly, a disclaimer of a property interest in Illinois within one year of bankruptcy is permitted since the disclaimer statute extinguishes any existing property interest. This clearly frustrates and is inconsistent with the intent of Congress.

The Trustee is in no way attempting to abolish disclaimers in Illinois. On the contrary, the Trustee recognizes that disclaimers, originally allowed to relieve the burden of gift and estate taxes, serve many useful non-bankruptcy purposes. In addition, the Trustee does not in any way dispute the Illinois Supreme Court's right to determine that creditors may not set aside disclaimers as fraudulent conveyances under Illinois law. However, the Illinois Supreme Court cannot define a property interest in a

way which interferes with the federal statutory scheme embodied in the Bankruptcy Code.

In this case, the Trustee is merely requesting the opportunity to prove as he alleged in his Second Amended Complaint that Debtor's disclaimer of an interest in property should be avoided because it was a transfer made for the sole purpose of hindering or defrauding her creditors. This appears to be a case of first impression in the United States Supreme Court. The only pertinent state law issue is whether Illinois recognizes that a devisee has an interest in property immediately prior to the time of the disclaimer. Clearly, Illinois recognizes such a right. Accordingly, this Court should conclude that the Debtor's disclaimer of her inheritance

occurring within one year prior to the filing of her bankruptcy petition was a "transfer of an interest of the debtor in property" which the Trustee may avoid pursuant to the provisions of Section 548 of the Bankruptcy Code.

II. THE DEBTOR'S DISCLAIMER OF A DEVISE WAS A FRAUDULENT CONVEYANCE WITHIN THE MEANING OF SECTION 548 OF THE BANKRUPTCY CODE.

To resolve the issue presented for review, this Court must determine whether the Debtor's disclaimer of a devise was a "transfer of an interest of the debtor in property." (11 U.S.C. Sec. 548 (1990)) While state law applies to determine the existence of a property interest, federal bankruptcy law is applicable to determine whether a transfer of that interest has occurred. *In Re Stevens*, 112 B.R. 175 (Bankr. S.D.Tx. 1989).

The term "transfer" as defined in Section 101(50) of the Bankruptcy Code (11 U.S.C. Sec. 101(50) (1990)) is quite broad. Section 101(50) provides in part: "Transfer means every mode direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property."

Additionally, Section 541 of the Bankruptcy Code defines the property interest of the Debtor that would become the property of the estate. The term "property" is a broad all-encompassing term which has been interpreted to include anything of value which, but for the transfer, might have been preserved by the Trustee for the ultimate benefit of the bankrupt's creditors. *In The Matter of Smiley*, 864 F.2d 562 (7th

Cir. 1989); *In Re Peery*, 40 B.R. 811 (Bankr. M.D.Tenn. 1984); *Stevens*, 112 B.R. at 176-77.

The legislative history of Section 101(50) indicates the broad scope of the terms "transfer" and "interest in property":

> The definition of a transfer is to be as broad as possible. Many potential limiting words in current law are deleted and the language is simplified. Under this definition, any transfer of an interest in property is a transfer including a transfer of possession, custody or control even if there is no transfer of title because possession, custody and control are interests in property.

S.Rep.No. 95-989, 95th Congress 2nd Session 26-27 (1978); H.R.Rep.No. 95-595, to accompany H.R. 8200, 95th Congress 1st Session 313-14 (1977). (emphasis added)

A. The Debtor had a constitutionally protected property interest in the devise from the time of the testator's death until the time that she executed a disclaimer.

In determining whether the Debtor's disclaimer of the devise was a fraudulent conveyance, pursuant to the requirements of Section 548, the Court must first decide whether the Debtor had a property interest in such devise which is recognized under state law. It is well settled in Illinois that devised realty passes directly to the devisee, rather than to the executor of the estate, upon the death of the testator. *In Re Estate of Hall*, 127 Ill.App.3d 1031, 469 N.E.2d 378 (1984). Accordingly, the devisee has a property interest in the devise from the time of the testator's death until the time she executes the disclaimer.

In addition, Section 4-13 of the Illinois Probate Act expressly states that the admission of a will to probate actually effects a transfer of title to realty from the testator to the devisee. (Ill.Rev.Stat. 1987, ch. 110 1/2, para. 4-13) The presumption of acceptance by a beneficiary does not vest irrevocable title in the beneficiary. *Tompkins State Bank v. Niles*, 127 Ill.2d 209, 537 N.E.2d 274 (1989). However, title to the devised property need not be vested irrevocably for the beneficiary to have a recognized property interest. Thus, under Illinois law, Debtor had a property interest prior to and at the time she executed the disclaimer.

Further, Section 2-7 of the Illinois Probate Act (Ill.Rev.Stat. 1987, ch. 110 1/2, para. 2-7) itself indicates that the

debtor who disclaims a devise under a will has a property interest recognized by Illinois law. For example, Section 2-7(a) is entitled "Right to Disclaim Interest in Property" (emphasis added). In addition, Section 2-7(a) gives the right to disclaim to any person "to whom any property or interest therein passes" (emphasis added). Section 2-7(b) provides that the disclaimer itself "shall describe the property or part or interest disclaimed" (emphasis added). Section 2-7(c), which sets forth the requirements for a valid delivery of the disclaimer, requires that the disclaimer shall be delivered to the transferor or donor or ". . .to a person having possession of the property, part or interest or who is entitled thereto by reason of the disclaimer. . ." (emphasis added).

The aforementioned language of Section 2-7 clearly supports the Trustee's contention that the devisee has an interest in property prior to executing a disclaimer. If the Debtor had acquired no interest, there would be no property interest to disclaim and the disclaimer would be a nullity.

The Debtor's property interest which is recognized by Illinois law is constitutionally protected. "To have a property interest in a benefit, a person . . . must have more than a unilateral expectation of it." *Board of Regents v. Roth*, 408 U.S. 564 (1972). Lower courts have correctly applied this standard and held that the beneficiaries of a will have a property interest in the assets devised under the will.

For example, in *McKnight v.*

Boggs, 253 Ga. 537, 322 S.E.2d 283 (1984), the Georgia Supreme Court invalidated a statute which required that notice to probate a will be given to heirs-at-law, but not to other interested parties. The court held that a legatee under an earlier will of the decedent had a constitutionally protected property interest. Thus, the Georgia statute violated due process standards "insofar as it fails to require that notice be given to propounders and beneficiaries of another purported will of the decedent which has been filed previously for probate within the same county." *McKnight*, at 538, 322 S.E.2d at 284.

More recently, the Georgia Supreme Court in *Garner v. Harrison*, 400 S.E.2d 925, 927 (Ga. 1991), construed the statute as amended following

McKnight. In this case, the court held that the statute "requires the propounder of any will to give notice to the propounders and beneficiaries of any other wills of the testator offered for probate in the same county."

In *Palazzi v. Estate of Gardner*, 32 Ohio St.3d 169, 512 N.E.2d 971 (1987), the Ohio Supreme Court reached a similar result. In *Palazzi*, the court held that an heir who would take through intestacy upon invalidation of a will "possesses a property interest entitled to due process protection." Under the analysis in *Palazzi*, where even a contingent beneficiary was found to have a property interest, it is obvious that a named beneficiary would also have such a property interest. A similar conclusion was reached in *Garner*.

Obviously, *Palazzi*, *McKnight* and *Garner* were not concerned with the Bankruptcy Code, rather these cases dealt with the due process clause. However, these cases establish that a devisee obtains a property interest from the time of the testator's death until the time that she executes a disclaimer, relinquishing that interest.

The court of appeals did not deny that the debtor in this case possessed a property interest. Instead, it stated that a valid disclaimer "relates back to the testator's death for all purposes and eliminates any interest the beneficiary has in the property disclaimed." *In re Atchison*, 925 F.2d 209, 212 (7th Cir. 1991).

B. The disclaimer of the devise by the Debtor constituted a transfer of a property interest for purposes of Section 548.

The next step in resolving the issue presented is to determine whether there was a transfer, within the meaning of Section 548(a), of the property interest possessed by the Debtor. The court of appeals stated that the Trustee's contention that there must have been some existing property interest at the moment of the disclaimer ignores the Illinois statute that expressly states that for all purposes there is not. *In re Atchison*, at 211. The court of appeals relied upon *Tompkins* which stated that for all purposes a disclaimer in Illinois relates back to the date of the decedent's death. Consistent with that theory, the court of appeals held that

although a testamentary devise passes directly to the devisee upon the death of the testator, a valid disclaimer under Section 2-7 relates back to the testator's death for all purposes and retroactively eliminates any interest that the devisee had in the property disclaimed and therefore any interest in property which the Trustee may avoid under Section 548(a) of the Bankruptcy Code.

The court of appeal's reasoning is flawed in that the Illinois relation back doctrine does not erase the fact that the Debtor transferred a vested property interest recognized under Illinois law at the time she executed the disclaimer. The *Tompkins* court expressly stated that devised realty vests directly in the devisee upon the death of the testator,

Tompkins, at 219, 537 N.E.2d at 278, and that from the time the testator dies until the devisee disclaims, the devisee has the right or power either to accept or disclaim the devise of property made in the testator's will. *Tompkins*, at 220, 537 N.E.2d at 279.

It is important to remember that although state law applies to determine the existence of an interest in property, federal bankruptcy law is applicable to determine whether a transfer of that interest has occurred. *McKenzie v. Irving Trust Co., 323 U.S. 365 (1945); Stevens*, 112 B.R. at 177. Relation back is merely a legal fiction which defines the consequences of having property rights vest at death and then revest in others after a valid disclaimer. *Peery*, 40 B.R. 811, 815

(Bankr. M.D. Tenn. 1984). *See*, Hirsch, *The Problem of the Insolvent Heir*, 74 Cornell L.Rev. 587, 596 (1989). In addition, legal fictions created for other purposes by state law cannot be used to defeat the express definition of property of the estate contained in the Bankruptcy Code. *In Re Watson*, 65 B.R. 9 (Bankr. C.D.Ill. 1986). Although the relation back doctrine may have significant non-bankruptcy effects on estate taxation and other issues, relation back does not alter the fact that, at the time of the disclaimer, a transfer of an interest of the Debtor in property occurred which the Trustee may avoid pursuant to Section 548.

In *In Re Stevens*, 112 B.R. 175 (Bankr. S.D.Tex. 1989), the only other

case which considered the precise issue, the court concluded that the debtor had an interest in property, in the form of a testamentary devise, on the date of the testator's death and the transfer occurred on the date of the disclaimer, even though the disclaimer may have been "effective" for purposes of state law as of the date of the testator's death. The *Stevens* court applied Texas probate law which, like Illinois law, provided that devised property vests immediately in the devisees upon the death of the testator.

The court of appeals dismissed this case as unpersuasive because it fails to give full application to the relation back doctrine under applicable state laws. However as stated above, the *Stevens* court expressly concluded

that "the transfer occurred on the date of the renunciation even though the renunciation may have been 'effective' for purposes of state law as of the date of death." This statement refers to the Texas Probate Code section 37A which provides in part that a disclaimer shall be effective as of the death of decedent. (Tex.Prob.Code Ann. Sec. 37A (Vernon 1991).) Thus, the *Stevens* court applied the relation back doctrine under Texas law to reach an opposite result.

Another case, *In Re Peery*, 40 B.R. 811 (Bankr. M.D. Tenn. 1984), although not precisely on point, is instructive as to the issue presented. In *Peery*, the debtor was a devisee under the will of his grandfather. Under Tennessee law, as under Illinois law, the

debtor acquired rights in the real property immediately upon his grandfather's death. The debtor subsequently, executed a partial renunciation to his entitlement to the real property distributed under the will, and, slightly over nine months later, filed a bankruptcy petition. A creditor, which had filed a state court collection action following the testator's death but prior to the filing of the bankruptcy petition, argued to the Bankruptcy Court that the debtor's renunciation was a fraudulent transfer which would justify denial of a discharge pursuant to Section 727(a)(2)(A) (11 U.S.C. Sec. 727(a)(2)(A)).

The *Peery* court noted that although title to and possession of the property could not be realized until

formal distribution, an "interest in property" attached upon the death of the debtor's grandfather. Accordingly the *Peery* court, noting that "property" under the Bankruptcy Code is not dependent upon title or possession, concluded that the debtor's right to control, direct or receive a testamentary distribution constituted an "interest in property for purposes of the Bankruptcy Code. *Peery*, 40 B.R. at 813.

Although the issue presented in *Peery* concerned the application of Section 727 rather than Section 548, these two sections are quite closely related. The gravamen of these sections is the "intent to hinder, delay or defraud" creditors. Indeed, Sections 548 and 727 are so closely related that a debtor is collaterally estopped from

relitigating the issue of fraudulent intent in a Section 727 proceeding where that issue has been previously determined in a Section 548 proceeding. *Cohen v. Bucci*, 103 B.R. 927 (Bankr. N.D.Ill. 1989). Given the close relationship between Section 548 and Section 727, if a debtor can be denied a discharge for a pre-bankruptcy disclaimer under Section 727, then certainly the pre-bankruptcy disclaimer itself may be avoided as a fraudulent conveyance under Section 548.

The Seventh Circuit Court of Appeal also found *Peery* unpersuasive because it failed to give "full application to the relation back doctrine under applicable state laws." *In Re Atchison*, at 211. However, *Peery* did consider the effect of Tennessee's relation back doctrine on a disclaimer.

The court stated that the relation back doctrine did not change the fact that there was a transfer of the debtor's vested property interest at the time of the renunciation. The *Peery* court concluded that "renunciation may be 'effective' for purposes of state law as of the date of the testator's death; however, the 'transfer' of the debtor's rights and interests for purposes of the bankruptcy code took place on the date of the renunciation." *Peery*, 40 B.R. at 815.

III. THE SEVENTH CIRCUIT COURT OF APPEALS DID NOT ADDRESS THE CONSTITUTIONAL ISSUE RAISED BY THE INCONSISTENCY OF SECTION 548 OF THE BANKRUPTCY CODE AND THE ILLINOIS RELATION BACK DOCTRINE.

In holding that the disclaimer did not constitute a transfer of an interest in property which the Trustee may avoid

under Section 548(a) of the Bankruptcy Code, the Seventh Circuit Court of Appeals stated that "all applicable state law must be construed to determine whether a debtor possesses a property interest." However, the court completely disregarded the important constitutional issue which arose out of this action.

The Constitution vests in Congress the power to establish uniform laws on the subject of bankruptcies. (U.S. Const. Art. I, Sec. 8) Congress, through the plenary powers set forth in the bankruptcy clause, has the power to establish uniform laws on the subject of bankruptcy throughout the United States. Such power is unrestricted and paramount, and the states may not interfere. *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929).

The public policy underlying the Bankruptcy Code is to give debtors a "fresh start", or opportunity to reorganize their debts, and to allow equitable distribution of a debtor's assets among creditors. The broad language set forth in the Bankruptcy Code evinces Congress' clear intent to bring all of a debtor's interest in property, both legal and equitable, including every fraudulent transfer of property within one year prior to the filing of the bankruptcy petition, into the bankruptcy estate in order to effectuate an equitable distribution among creditors.

Section 548(a) permits a trustee in specified circumstances to "avoid any transfer of an interest of the debtor in property. . .that was made. . .within one year before the date of the filing of the

[bankruptcy] petition. . ." The purpose of this provision is to prevent a debtor from transferring assets on the eve of bankruptcy in an effort to defraud creditors. But, the relation back doctrine as applied by the court below, would frustrate this congressional purpose.

The bankruptcy judge recognized the disconsonant results of his decision in this case when he stated, "I don't particularly like my decision in this case. . . I wish there was some way I didn't have to make it." (Transcript of May 9, 1989, hearing at page 14.) In this case, the courts below could have avoided the result of allowing debtors to defraud creditors, but chose instead to rely upon provisions of Illinois law which interfere with federal bankruptcy

law. However, the constitutional doctrine of federal preemption prohibits such a result. Under the approach of the court of appeals, a state may not only define a property interest in the first instance but may redefine that interest as it sees fit, enabling a party to transfer assets on the eve of bankruptcy and make the effective date of the transfer "relate back" to some earlier event. Clearly, the power of Congress to prevent fraudulent transfers can be effectively nullified if states may employ a relation back doctrine to extinguish any property interest that would otherwise be reached by the trustee in bankruptcy.

Section 548(a) was specifically designed to prevent fraudulent transfers. A state cannot require

parties within its jurisdiction to disregard that provision. Neither can it accomplish the same thing by redefining property out of existence through a relation back doctrine, after a property interest has already attached.

The relation back doctrine enables a devisee, who disclaims a devise, to escape the fraudulent transfer provision of the Bankruptcy Code and to pass the received and rejected benefit, usually to his or her children. In practice, this is similar to back dating a document. The relation back doctrine, as articulated by the Illinois Supreme Court, back dates a transfer of a property interest back to the point where it first arose. The Seventh Circuit Court of Appeals opinion then states that, since it relates back for all

purposes, it never existed! Society does not condone the back dating of documents. Neither should this Court allow the relation back doctrine to produce such fraudulent results.

Although Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law, *Butner v. United States*, 440 U.S. 48, 54 (1979), this incorporation of state law by reference was not intended to generate fraudulent transfers. Indeed, the Court has been careful to note that the Bankruptcy Code includes "provisions invalidating certain security interests as fraudulent" and that "[a]part from these provisions", state law usually governs the definition of property. *Butner* at 54. A state may therefore define property interests

in the first instance, but Section 548(a) does not permit a state to extinguish pre-existing property interests through a relation back doctrine or other legal fictions.

It is true that the state has an interest in defining rights in the disposition of property at death. But the state's interest in defining property rights and Congress' interest in avoiding fraudulent transfers in bankruptcy can both be served by construing the term "property" in Section 548(a) to mean essentially what that term means in the fourteenth amendment. (U.S. Const., Amend. XIV.) This would allow a state broad latitude to define property rights but would not permit the state, after creating such rights, to alter them arbitrarily and in disregard of federal

bankruptcy policy. *See, Paul v. Davis*, 424 U.S. 693, 710-11 (1976), (noting that liberty and property interests attain protected status "by virtue of the fact that they have been initially recognized . . . by state law" but that they are governed by due process guarantees "whenever the state seeks to remove or significantly alter that protected status.") Section 548(a), properly construed, permits the state to define property interests but, like the fourteenth amendment, it curtails state power to extinguish such interests after they have been created.

The ruling of the court of appeals proceeded on a different and entirely erroneous theory. It correctly assumed that a state may define property interests in the first instance, but it

incorrectly assumed that a state may modify its definition as time goes on and make the new definition relate back to some earlier event. If a state could authorize a debtor to transfer his property and provide that the transfer relates back for all purposes, Section 548(a) of the Bankruptcy Code would be rendered meaningless. Thus, the relation back doctrine, as applied to this case, conflicts with Section 548(a) and cannot stand.

IV. THE CASES RELIED UPON BY THE LOWER COURTS MAY BE DISTINGUISHED FROM THE CASE AT BAR.

The lower courts relied primarily upon the cases of *Tompkins State Bank v. Niles*, 127 Ill.2d 209, 537 N.E.2d 274 (1989) and *Hoecker v. United Bank*

of Boulder, 476 F.2d 838 (10th Cir. 1973). However, these cases may be distinguished from the case *sub judice*.

In *Tompkins*, the owner of certain real estate entered into a contract to sell it to her son, Donald Niles, and his wife. Donald and his wife subsequently mortgaged the property described in the real estate contract, assigning all of their interest in the real estate to the bank as security for all of their obligations due to the bank. The owner of the real estate subsequently declared Donald and his wife in breach of the contract on the ground that they, by purporting to mortgage their interest to the Bank, violated a provision of the contract prohibiting assignments without consent of the vendor. The parties

agreed that Donald and his wife lost all interest in the contract at the time of the declaration of forfeiture.

The owner subsequently died, having made a will leaving all of her property to Donald. The will further provided that in the event that Donald predeceased her, her property would be placed in trust for the benefit of his wife and his children. After the will was admitted to probate, Donald and his wife filed disclaimers of the devise. The bank subsequently sought to foreclose its mortgage on certain tracts of property owned by Donald and his wife, including the property described in the real estate contract and subsequently devised to Donald.

In support of their motion to dismiss the foreclosure action, Donald and his

wife argued that their disclaimers terminated any interest they had in the property and were neither barred under Section 2-7(e) of the Probate Act, nor fraudulent conveyances under Illinois law (Ill.Rev.Stat. 1985, ch. 59, para. 4), *Tompkins*, at 213, 537 N.E.2d at 276. The trial court ruled in favor of the bank, but the appellate court, with one judge dissenting, reversed. *Tompkins State Bank v. Niles*, 160 Ill.App.3d 226, 513 N.E.2d 548 (1987).

On review in the supreme court, the bank argued that title to the devised property vested in Donald, within the meaning of the after-acquired-title statute, immediately upon his mother's death and had the legal effect of barring passage of title to him or the vesting of an estate in him. Accordingly, the court

concluded that the bank was precluded from claiming that its mortgage lien encumbered the devised property by virtue of the after-acquired-title statute. The court also determined that because Donald encumbered only the property interests which he acquired under the real estate contract, and did not thereafter act in manner inconsistent with a complete renunciation of any interest in the estate devised to him, Section 2-7(e) does not bar him from disclaiming his interests in the devised estate.

The bank also argued that Donald's disclaimer was a fraudulent conveyance under Illinois law. The *Tompkins* court noted that although Section 2-7 does not specifically state that a disclaimer will defeat the right of creditors to disclaimed property, it does

provide that a disclaimer will relate back "for all purposes" to the date of the decedent's death. Accordingly, the *Tompkins* court concluded that creditors may not set aside a disclaimer as a conveyance within the scope of the fraudulent conveyance statute (Ill.Rev.Stat. 1985, ch. 59, para. 4).

Despite the heavy reliance placed upon it by the lower courts, *Tompkins* simply is not, in any way, dispositive of the issue presented in this appeal. The only questions presented for review in *Tompkins* were whether the disclaimers executed by Donald and his wife were barred by Section 2-7(e) and whether such disclaimers were fraudulent conveyances under Illinois law. With respect to the first issue considered by the *Tompkins* court, the Trustee has never

contended that the debtor did not comply with the provisions of Section 2-7(e). With respect to the second issue, the Trustee recognizes that, following *Tompkins*, a disclaimer may not be set aside by a creditor under the Illinois fraudulent conveyance statute. Accordingly, the Trustee did not rely upon that portion of Count II of his Second Amended Complaint alleging a violation of Section 544(b) in the lower courts and makes no Section 544(b) argument now. The sole issue presented on review in this case is whether the Debtor's disclaimer can be avoided as a fraudulent transfer under Section 548. This issue was not in any way considered by the *Tompkins* court.

However, the lower courts relied heavily on certain *dicta* contained in

the *Tompkins* case. Specifically, those courts focused on the *Tompkins* court's statements that a disclaimer in Illinois relates back "for all purposes" to the date of the decedent's death. Although relation back may have significant nonbankruptcy effects, relation back does not alter the fact that, at the time of the disclaimer, a transfer of an interest of the Debtor in property occurred which the Trustee may avoid pursuant to Section 548. (Discussed above in Section IIB.)

In addition, the Illinois Supreme Court decision in *Tompkins* is against social policy. When a debtor takes evasive action by transferring his assets to his relatives, creditors have a right to recover these assets under the law of fraudulent conveyances. However, when an

insolvent heir transfers his interest in property to his children by disclaiming a devise under a will, Illinois does not allow creditors to pursue this property under its fraudulent conveyances law. Accordingly, heirs are allowed to avoid the claims of their creditors. This obviously leads to inconsistent results in similar situations.

The lower courts' reliance upon the *Hoecker* case is also misplaced. In *Hoecker*, the court determined that the debtor's execution of a disclaimer pursuant to the Colorado disclaimer statute was not a transfer of property or an interest therein. Accordingly, the trustee was not entitled to recover for the debtor's estate the property which the beneficiary would have received from his father's estate if he had not

executed the disclaimer.

The *Hoecker* case is readily distinguishable from the case at bar because it was decided under the Bankruptcy Act, not the current Bankruptcy Code. The reasoning of the *Hoecker* majority opinion is premised upon the fact that "none of the property disclaimed would pass to or be vested in the disclaiming beneficiary." (476 F.2d at 841.) However, the Bankruptcy Code has completely eliminated the vesting concept set forth in the Bankruptcy Act. *Watson*, 65 B.R. at 12; *In Re Lewis*, 45 B.R. 27 (Bankr. W.D. Mo. 1984).

In addition, in a cogent dissenting opinion, Judge Holloway noted that an action brought under a federal statute for the avoidance of fraudulent transfers

should not be denied because of a state provision concerning the relation back doctrine. Accordingly, Judge Holloway would have allowed the trustee to avoid the disclaimer because under Colorado law, as under Illinois law, the devisee retained power to control the passing of his interest in the property and the disclaimer was a mode of parting with his interest in the property and hence a transfer for purposes of bankruptcy law.

V. PUBLIC POLICY DICTATES THAT A TRUSTEE SHOULD BE ABLE TO AVOID A DEBTOR'S DISCLAIMER OF A DEVISE AS A FRAUDULENT CONVEYANCE UNDER SECTION 548.

The ruling of the lower court assumed that a state may not only define property interests in the first instance, but may subsequently modify its definition and make the new definition relate back to

some earlier event. However, Section 548(a) does not permit a state to extinguish pre-existing property interests through a relation back doctrine or other legal fictions. Were this not so, a state could authorize a debtor to make a gift of his assets and provide that the gift would relate back to a date of the debtor's choice. Such a use of the relation back doctrine, permissible under the approach of the court below, would wholly obliterate Section 548(a) of the Bankruptcy Code.

This is the first reported case under the Bankruptcy Code to discuss this issue. Other states may use this Court's decision to justify a change in their law to adopt a version of the Illinois law allowing disclaimers. More important would be the impact of publications in

Illinois and other Uniform Probate states citing the decision of the Seventh Circuit Court of Appeals as authority for pre-bankruptcy transfers immune from bankruptcy trustee attack. Probate lawyers would have to consider disclaimers in all estates. In many instances beneficiaries would be better off to disclaim, file bankruptcy and accept, in the future, from their children the benefit of the property passing to their children because of the disclaimer.

The states which have adopted the Uniform Probate Code as well as other states, which have authorized a disclaimer to relate back to the date of the testator's death, are in effect disregarding Section 548 of the Bankruptcy Code. However, nowhere in

Section 548 did Congress allow the state legislatures to opt out of the language of that section. Only one section in the Bankruptcy Code has such an "opt out" provision - Section 522. Allowing these states to eviscerate the language of Section 548 of the Bankruptcy Code should not be permitted.

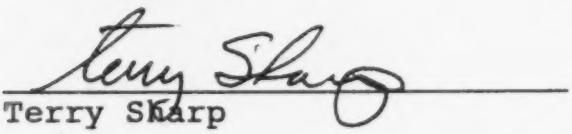
As a result of the court of appeals' decision, this issue will arise more frequently. Only this Court can provide the necessary guidance to the federal courts concerning the proper interpretation of Section 548(a) with regard to the relation back doctrine.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICE OF TERRY SHARP, P.C.

BY: 
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APPENDIX

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 18, 1991

Before

Hon. William J. Bauer, Chief Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Hubert L. Will, Senior District Judge*

In re: DARRELL RAY ATCHISON and ANOLA MARIE ATCHISON, Debtors.	)	Appeal from the United States District Court for the Southern District of Illinois.
CHARLES E. JONES, TRUSTEE, Plaintiff-Appellant,	)	No. 89-5220
No. 89-3715 vs. ANOLA MARIE ATCHISON, et al., Defendants-Appellees.	)	William L. Beatty, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en

banc in the above-entitled cause filed by counsel for the appellant Charles E. Jones, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing en banc.

It is hereby ordered that the aforesaid petition for rehearing and suggestion for rehearing en banc be and the same is hereby DENIED.

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* The Honorable Hubert L. Will, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-3715

IN RE:

DARRELL RAY ATCHISON and
ANOLA MARIE ATCHISON,

Debtors.

CHARLES E. JONES, TRUSTEE,

Plaintiff-Appellant,

v.

ANOLA MARIE ATCHISON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 89-5220—**William L. Beatty,** *Judge.*

ARGUED DECEMBER 3, 1990—DECIDED FEBRUARY 15, 1991

Before BAUER, *Chief Judge,* MANION, *Circuit Judge,* and WILL, *Senior District Judge.**

WILL, *Senior District Judge.* Anola Atchison and her husband Darrell Atchison filed for joint bankruptcy under

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* The Honorable Hubert L. Will of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

Chapter 7 of the Bankruptcy Code less than three months after she disclaimed an inheritance under her father's will, causing the property to pass to the couple's children. Charles Jones, the appointed trustee, filed a complaint which alleged that Anola Atchison's disclaimer was voidable under Section 548(a) of the Bankruptcy Code, 11 U.S.C. § 548(a), which permits, under certain circumstances, a trustee to avoid a debtor's transfer of an interest in property made within one year of the bankruptcy filing.[1] On the debtors' motion to dismiss, the bankruptcy judge held that Anola did not have an interest in the devised property which could be transferred and dismissed the complaint as failing to state a claim under Section 548(a).[2] The district court affirmed and Jones appeals.

The sole question is whether Anola's disclaimer was a "transfer of an interest of the debtor in property" which the trustee may avoid under Section 548(a). The Bankruptcy Code defines the word "transfer" to include "every mode . . . of . . . parting with . . . an interest in property", 11 U.S.C. § 101(50), but it does not define what constitutes an interest in property. Absent a federal provision to the contrary, a debtor's interest in property is determined by applicable state law. *See Butner v. United*

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[1] Section 548(a) provides in pertinent part:

> The trustee may avoid any transfer of an interest of the debtor in property . . . that was made . . . within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (1) made such transfer . . . with actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted; or
>
> (2) (A) received less than a reasonably equivalent value in exchange for such transfer . . . and
>
> (B) was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer. . . .

[2] The remaining allegations of the complaint were either dismissed or conceded by the parties.

States, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979); *In the Matter of Chicago, Rock Island and Pacific Railroad Co.*, 772 F.2d 299, 302 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); *In re Detlefsen*, 610 F.2d 512, 515 (8th Cir. 1979). The parties agree that Illinois law controls.

Under Illinois law, Anola's testamentary gift passed directly to her upon her father's death. *Tompkins State Bank v. Niles*, 127 Ill. 2d 209, 219, 537 N.E.2d 274, 278 (1989); *Trustees of Schools v. Clippinger*, 404 Ill. 202, 204, 88 N.E.2d 451, 452 (1949). She chose to exercise her right to reject the property by executing a disclaimer. *See Tompkins*, 127 Ill. 2d at 220, 537 N.E.2d at 279; Ill.Rev.Stat., Ch. 110½, para. 2-7(a).[3] Once the disclaimer was executed, the property passed as if Anola had predeceased her father and the disclaimer related back to the date of his death "for all purposes." Ill.Rev.Stat., Ch. 110½, para. 2-7(d).[4] Therefore, the effect of the disclaimer was to prevent Anola from ever acquiring an interest in the property. *See Tompkins*, 127 Ill. 2d at 219-220, 537 N.E.2d at 279.

The trustee argues that the disclaimer constituted a transfer of an interest in property because when Anola executed the disclaimer she must have had an interest which could be disclaimed. But she did not. The relation back provision of the Illinois disclaimer statute eliminated

---

[3] Section 2-7(a) provides:

> Right to Disclaim Interest in Property. A person to whom any property or interest therein passes, by whatever means, may disclaim the property or interest in whole or in part by delivering or filing a written disclaimer as hereinafter provided.

[4] Section 2-7(d) provides in pertinent part:

> Effect of Disclaimer. Unless expressly provided otherwise in an instrument transferring the property or creating the interest disclaimed, the property, part or interest disclaimed shall descend or be distributed . . . (a) in the case of a transfer by reason of the death of any person, as if the disclaimant had predeceased the decedent . . .; and . . . the disclaimer shall relate back to such date for all purposes.

any interest Anola held at the time of the disclaimer. Although there is a presumption that a beneficiary accepts a testamentary gift, a valid disclaimer overcomes this presumption and retroactively erases any interest in the beneficiary disclaiming. *See Tompkins*, 127 Ill. 2d at 219-220, 537 N.E.2d at 279; Ill.Rev.Stat. ch. 110½, para. 2-7.

Cases cited by the trustee to the contrary are unpersuasive because they fail to give full application to the relation back doctrine under applicable state laws. *See In re Peery*, 40 B.R. 811 (Bankr. M.D. Tenn. 1984); *In re Stevens*, 112 B.R. 175 (Bankr. S.D. Tex. 1989). Section 2-7 of the Illinois Probate Act expressly states that a disclaimer relates back to the death of the testator "for all purposes." *See also Tompkins*, 127 Ill. 2d at 221, 537 N.E.2d at 274. To argue, as the trustee does, that at the moment of the disclaimer there had to be some property interest which the beneficiary disclaimed ignores the express language of the Illinois disclaimer statute which says for all purposes there was not. Anola's refusal to accept an interest in property to which she was entitled is not a transfer of that interest to another. *Cf. Hoecker v. United Bank of Boulder*, 476 F.2d 838 (10th Cir. 1973) (holding that under Colorado law, a disclaimer was not a fraudulent transfer under Section 67(d)(2) of the Bankruptcy Act). She had nothing to transfer. Under Illinois law, the property passed directly to Anola's children under the provisions of her father's will as though she had predeceased him.

A debtor's disclaimer relates back to the death of the testator whether or not it adversely affects the interest of creditors. *Tompkins*, 127 Ill. 2d at 229, 537 N.E.2d at 279. The relation back doctrine favors the right of beneficiaries to reject a gift over competing interests. This does not unfairly prejudice creditors. Although the doctrine operates to permit a debtor to dodge creditors who might otherwise have access to inherited property, a testamentary gift could not be disclaimed if the debtor had used this property as a basis for acquiring credit. *See*

Ill.Rev.Stat. ch. 110½, par.2-7(e).[5] Illinois law protects creditors by limiting the right to disclaim to those beneficiaries who have not acted in a manner inconsistent with a complete renunciation of any rights to the disclaimed property, and there is no allegation that Anola acted in any manner which rendered her disclaimer invalid.

All applicable state law must be construed to determine whether a debtor possesses a property interest. Although a testamentary gift passes directly to a beneficiary upon the testator's death, a valid disclaimer under Section 2-7 relates back to the testator's death for all purposes and eliminates any interest the beneficiary has in the property disclaimed. Therefore, we hold that the disclaimer does not constitute a transfer of an interest in property which the trustee may avoid under Section 548(a) of the Bankruptcy Code. Accordingly, the decision of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[5] Section 2-7(e) provides in pertinent part:

> Waiver and Bar. The right to disclaim property . . . shall be barred by . . . (2) an assignment, conveyance, encumbrance, pledge, sale or other transfer of the property . . . by the disclaimant . . . or (4) an acceptance of the property . . . by the disclaimant.

USCA 79004—Midwest Law Printing Co., Inc., Chicago—2-15-91—500

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	
	)	
DARRELL RAY ATCHISON and ANOLA MARIE ATCHISON,	)	Civil Case Number 89-5220
	)	
Debtor(s),	)	Bk. No. 87-40410
	)	
CHARLES E. JONES, Trustee,	)	Adversary No. 88-0145
	)	
v.	)	
	)	
ANOLA MARIE ATCHISON, et. al.	)	
	)	
Defendants.	)	

ORDER

This matter comes before the court on the trustee's appeal from the bankruptcy court's order granting the debtor's motion to dismiss Count II of the trustee's second amended Complaint. In its final order of March 28, 1989, the bankruptcy court ruled that the debtor's

pre-bankruptcy disclaimer of her inheritance did not constitute a transfer of an interest in property, and therefore, could not be avoided by the trustee as a fraudulent transfer pursuant to Sections 544(b) and 548(a) of the Bankruptcy Code, (11 U.S.C. Section 101 et seq.). The trustee filed a motion for reconsideration. After a hearing, the bankruptcy court again granted the debtor's motion to dismiss.

The facts involved in this appeal are not in dispute. On April 16, 1987, debtor, Anola Atchison, executed a disclaimer of an inheritance of property left under the will of her deceased father. Less than three months later, on July 8, 1987, the debtor and her husband filed a joint petition in bankruptcy

pursuant to Chapter 7 of the Bankruptcy Code.

The sole issue on appeal is whether the bankruptcy court erred in finding that the debtor's pre-petition disclaimer did not constitute a transfer of an interest in property under Section 548(a) of the Bankruptcy Code.

The Illinois Supreme Court has ruled that a disclaimer of devised property does not constitute a voluntary conveyance or transfer of the disclaimed estate within the meaning of the Illinois fraudulent conveyance statute. Tompkins State Bank v. Niles, 127 Ill. 2d 209, 130 Ill. Dec. 207, 537 N.E.2d 274 (1989). Thus, on appeal, the trustee concedes that the debtor's pre-petition disclaimer cannot be avoided pursuant to Section

544(b)[1] of the Bankruptcy Code.

The trustee argues, however, that the court may avoid the disclaimer pursuant to 11 U.S.C. Section 548(a), which provides in pertinent part:

> The trustee may avoid any transfer of an interest of the debtor in property . . . that was made . . . within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --
>
> (1) made such transfer . . . with actual intent to hinder, delay, or defraud any entity to which debtor was or became . . . indebted; or
>
> (2) (A) received less than a reasonably equivalent value in exchange for such transfer . . . and
>
> (B) was insolvent on the date

---

[1]Section 544(b) provides:
The trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim. . . .
11 U.S.C. Section 544(b).

> that such transfer was made . . . or became insolvent as a result of such transfer . . .

11 U.S.C. Section 548(a).

The relevant inquiry under Section 548(a) is whether the debtor acquired an interest in property that could be transferred to her children. The Bankruptcy Code does not define an "interest in property" for the purposes of Section 548(a). The court, therefore, must consult state law to determine the existence and nature of an interest in property. In re Detlefsen, 610 F.2d 512 (8th Cir. 1979).

Ordinarily, under Illinois law, title to property vests in the devisee upon the death of the testator. Trustees of Schools v. Clippinger, 404 Ill. 202, 88 N.E.2d 451 (1949). A devisee, however,

retains the right or power to accept or disclaim the devise of property made in the testator's will. Tompkins State Bank, 127 Ill.2d 209, 130 Ill. Dec. 207, 537 N.E.2d 274 (1989). The disclaimer statute of the Illinois Probate Act provides:

> a) Right to Disclaim Interest in Property. A person to whom any property or interest therein passes, by whatever means, may disclaim the property or interest in whole or in part by delivering or filing a written disclaimer. . . .
> . . .
> d) Effect of Disclaimer. Unless expressly provided otherwise in an instrument transferring the property or creating the interest disclaimed, the property, part or interest disclaimed shall descend or be distributed . . . (a) in the case of a transfer by reason of the death of any person, as if the disclaimant had predeceased the decedent . . .; and . . . the disclaimer shall relate back to such date for all purposes.

Ill. Rev. Stat., ch. 110 1/2, par. 2-7 (emphasis added). Thus, under Illinois

law, "by disclaiming a devise, a beneficiary renounces any interest in the subject matter, and nothing passes to the beneficiary upon which a creditor may impose a lien." Tompkins State Bank, 127 Ill.2d at 229; 537 N.E.2d at 283.

In the instant case, the trustee does not contest the validity of the disclaimer executed by the debtor. Accordingly, when the debtor executed the disclaimer, the devise passed directly to her children with no interest remaining in the debtor. The debtor, therefore, had no interest in property that could be made the subject of a conveyance under Section 548(a) of the Bankruptcy Code.

The trustee urges the court to adopt the reasoning of the Tennessee bankruptcy court in finding that state law defines

the debtor's interest in property as the "right to accept or disclaim the devise property." In re Peery, 40 B.R. 811 (Bankr. M.D. Tenn. 1984).

The court declines to follow this approach because it ignores the effect of the disclaimer as state law defines the debtor's interest in property. Since testamentary succession is solely a matter of state law, the court finds it inappropriate to disregard state law as to the nature of the devisee's interest when the devisee rejects the proceeds of a testamentary devise. As previously noted, when a beneficiary executes a valid disclaimer, the beneficiary "has no estate that could be made the subject of a voluntary conveyance." Thompkins State Bank, 127 Ill.2d at 227-28; 537 N.E.2d at

282 (emphasis added).

Assuming arguendo that the debtor received a right to accept or disclaim the devised property, the court does not agree with the trustee's contention that the disclaimer operated as a transfer pursuant to Section 548(a) of the Bankruptcy Code. The court finds that, by definition, this right would be nontransferable since it could only be characterized as a personal right of the debtor.

It is well-settled that a transferor may only transfer property to the extent of the interest held therein. Thus, if the debtor transferred her right to accept or disclaim the inheritance, her children could only receive the right to make the debtor's decision as to the

disposition of the property. Accordingly, the court finds that an absurdity would result if it narrowly construed the debtor's interest in property as the right to accept or disclaim.

The trustee correctly points out that Congress intended to define "transfer" broadly within the meaning of the Bankruptcy Code. Section 101(50) provides:

> [E]very mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . . .

11 U.S.C. Sec. 101(50).

In addition, Section 541(a)[2] contains a broad definition of what constitutes "property" of the estate at the commencement of a bankruptcy proceeding. Pursuant to Section 541(a)(b), a trustee may avoid a post-petition disclaimer of inheritance as "any interest in property . . . that the debtor . . . becomes entitled to acquire . . . ." within 180 days after

---

[2]Section 541(a) provides in pertinent part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case . . . .

11 U.S.C. Sec. 541 (emphasis added).

the filing of bankruptcy. 11 U.S.C. Sec. 541(a)(b); In re Watson, 65 B.R. 9 (Bankr. C.D. Ill. 1986). In the case of a post-petition disclaimer, federal law controls the debtor's rights with respect to a testamentary disposition.

The court finds no authority for the proposition that Congress intended to usurp a devisee's right to accept or disclaim a testamentary devise prior to filing a petition in bankruptcy. The right to make a testamentary disposition and the laws regulating a testamentary devise are exclusively a matter within the states' concern. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 64 S.Ct. 384 (1944). To allow the trustee to avoid a pre-petition disclaimer of inheritance would undermine the validity

and exercise of rights under state law. Such a result would, in effect, force the beneficiary to accept or reject a devise contrary to rights granted by the state.

The court, therefore, holds that when the debtor executed a valid disclaimer of inheritance prior to filing bankruptcy, she extinguished any interest in the devised property. The debtor, therefore, had no interest to transfer that would implicate Section 548(a) of the Bankruptcy Code.

Accordingly, the bankruptcy court's order granting the debtor's Motion to Dismiss is hereby affirmed.

It is so ordered.

Dated: This 28 day of November, 1988.

/s/ William L. Beatty
William L. Beatty
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: DARRELL RAY ATCHISON and ANOLA MARIE ATCHISON,	)	In Proceedings Under Chapter 7
Debtors.	)	No. BK 87-40410
CHARLES E. JONES, TRUSTEE,	)	
Plaintiff	)	
vs.	)	ADVERSARY NO. 88-0145
ANOLA MARIE ATCHISON, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Count II of the trustee's second amended complaint alleges that on April 16, 1987, less than three months before filing of debtors' bankruptcy petition, debtor Anola Atchison executed a disclaimer of inheritance of property given to her under the will of her

deceased father. As a result of this disclaimer the property passed to debtor's children, defendants Darrell Keith Atchison and Debra Bedard. On July 8, 1987, debtor and her husband filed a joint petition in bankruptcy under Chapter 7.

The trustee seeks to avoid debtor's pre-bankruptcy disclaimer as a fraudulent transfer under Sections 544(b) and 548(a) of the Bankruptcy Code.[1] Defendants

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[1]Section 544(b) provides:

> The trustee may avoid any transfer of an interest of the debtor in property...that is voidable under applicable law by a creditor holding an unsecured claim ....

11 U.S.C. Sec. 544(b). Section 548(a) provides:

> The trustee may avoid any transfer of an interest of the debtor in property...that was made...within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --
>
> (1) made such transfer...with actual intent to hinder, delay, or

have filed a motion to dismiss Count II of the trustee's complaint, asserting that Count II should be dismissed as a matter of law because debtor's disclaimer did not constitute a "transfer" of an interest of the debtor in property so as to come within the fraudulent transfer provisions of Sections 544(b) and 548(a).

"Transfer" is defined by section 101(50) of the Bankruptcy Code as:

> [E]very mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property....

11 U.S.C. Sec. 101(50). Debtor's alleged

> defraud any entity to which debtor was or became indebted; or (2)(A) received less than a reasonably equivalent value in exchange for such transfer...and (B) was insolvent on the date that such transfer was made...or became insolvent as a result of such transfer....11 U.S.C. Sec. 548(a).

transfer in the instant case was made pursuant to Section 2-7 of the Illinois Probate Act (Ill.Rev.Stat., ch. 110 1/2, Sec. 2-7). That section provides in pertinent part:

> (a) Right to Disclaim Interest in Property. A person to whom any property or interest therein passes, by whatever means, may disclaim the property or interest in whole or in part by delivering or filing a written disclaimer....
> ....
> (d) Effect of Disclaimer. Unless expressly provided otherwise in an instrument transferring the property or creating the interest disclaimed, the property, part or interest disclaimed shall descend or be distributed...(a) in the case of a transfer by reason of the death of any person, as if the disclaimant had predeceased the decedent...; and ...the disclaimer shall relate back to such date for all purposes.

Federal law is controlling as to the meaning of "transfer," and this term has been construed broadly to include every method of disposing of or parting with property. Debtor's disclaimer would constitute a transfer if the effect of

the disclaimer was to transfer from her to her children the property devised under her father's will. See Hoecker v. United Bank of Boulder, 476 F.2d 838 (10th Cir. 1973). The issue to be resolved, then, is whether debtor acquired an interest in property that could be transferred by her disclaimer under Section 2-7.

The Bankruptcy Code does not define "an interest of the debtor in property" as used in Sections 544(b) and 548(a), and resort must be had to nonbankruptcy, or state, law to determine the existence and nature of such an interest. In re Detlefsen, 610 F.2d 512 (8th Cir. 1979); In re Universal Clearing House, 60 B.R. 985 (D. Utah 1986); In re Kjeldahl, 52 B.R. 916 (D. Minn. 1985). The right to testamentary disposition within a state exists only by statutory enactment of

such state and may be regulated, limited, conditioned or wholly abolished by the state. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526 (1944); Hoecker v. United Bank of Boulder. State law, therefore, is controlling on the issue of debtor's property interest in the instant case. See In re Detlefsen.

Under Illinois law, the effect of a disclaimer under a will is that the renunciation relates back to the moment when the gift was made, so that the estate does not vest in the disclaiming devisee but descends as though the disclaimant had predeceased the testator. Ill.Rev.Stat., ch. 110 1/2, Sec. 2-7(d)(1)(a); Tompkins State Bank v. Niles, 127 Ill.2d 209, 537 N.E. 2d 274 (1989); In re Estate of Hansen, 109 Ill. App. 2d 283, 248 N.E. 2d 709 (1969).

Since the disclaimer prevents passage of title to the disclaimant, such a "renunciation is not a voluntary conveyance and is not subject to attack by creditors." People v. Flanagin, 331 Ill. 203, 208, 162 N.E. 848, 850 (1928); In re Estate of Hansen. Rather, it is the rule of Illinois courts that a person does not have to accept an estate against his will, and this policy prevails over a policy of being fair to the creditors of the disclaiming person. See Tompkins State Bank v. Niles.

In the instant case, the Illinois disclaimer statute prevented the property disclaimed by debtor from vesting in her or passing from her to her children. As a result, the disclaimer executed by debtor did not operate as a transfer of an interest in property for purposes of Sections 544(b) and 548(a). State law,

moreover, provides that such a disclaimer does not violate the Illinois fraudulent conveyance statute (Ill.Rev.Stat., ch. 59, Sec. 4), and the trustee's 544(b) claim based on this provision must fail in any event. Tompkins State Bank v. Niles; In re Estate of Hansen. In the absence of a transfer of property from debtor to her children, there was no fraudulent transfer under either Sec. 548(a) or Sec. 544(b) as alleged in Count II, and this Count should be dismissed.

The Court is aware of no case decided under the Bankruptcy Code that addresses the effect of a pre-bankruptcy disclaimer in a fraudulent transfer action. In Hoecker v. United Bank of Boulder, a factually similar case decided under the former Bankruptcy Act, the 10th Circuit Court of Appeals construed the Colorado disclaimer statute to find that a

disclaimer executed by the debtor within one year prior to filing bankruptcy was not a fraudulent transfer where the effect of the disclaimer was that no property vested in or passed from the debtor to his children but rather passed directly from the testator to the children. The trustee contends that Hoecker is distinguishable from the instant case in that it was decided under the Act, which contained a vesting requirement for determining what property would become part of the estate that has been eliminated under the Code.[2] The trustee relies on In re Watson, 65 B.R. 9

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[2]Section 70a of the Bankruptcy Act, predecessor to Sec. 541(a)(5) of the Code, provided for inclusion in the bankruptcy estate of property "which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance. . . ." 11 U.S.C. Sec. 110(a), para. 2 (1976) emphasis added).

(Bankr. C.D. Ill. 1986), in which the court found that a disclaimer executed under Illinois law within 180 days after bankruptcy did not prevent the disclaimed property from becoming property of the estate under Sec. 541 of the Code. 11 U.S.C. Sec. 541.

Contrary to the trustee's contention, Watson and other cases involving post-petition disclaimers (see In re Cornell, 95 B.R. 219 (Bankr. W.D. Okla. 1989); In re Betz, 84 B.R. 470 (Bankr. N.D. Ohio 1987); Matter of Lewis, 45 B.R. 27 (Bankr. W.D. Mo. 1984)) have no application to the instant case. In Watson, the disclaimer was executed after the bankruptcy filing, and the court's decision was based on Sec. 541(a)(5) of the Bankruptcy Code that specifically includes within the estate "any interest in property. . . that the debtor. . .

becomes entitled to acquire" through inheritance or as beneficiary of a life insurance policy within 180 days after the bankruptcy filing. 11 U.S.C. Sec. 541(a)(5) (emphasis added). The Watson court correctly found that Sec. 541(a)(5) supersedes the debtor's right to renounce under state law when the disclaimer is executed post-petition. See In re Cornell; Matter of Lewis; see also In re Detlefsen.

In this case where the disclaimer was executed prior to bankruptcy, no Code provision applies to alter the effect of state law regarding debtor's property interest. Unlike Sec. 541, which reflects a new concept of "property of the estate" under the Code, the Code sections relating to fraudulent transfer are substantially the same as under the Act, and case law interpreting the

earlier provisions remains viable. See 4 Collier on Bankruptcy, Sec. 541.02[1], at 541-10; Sec. 548.01[1], at 548-8. The Hoecker case, though decided under pre-Code law, may not be distinguished on that basis and, because of the factual similarity to the instant case, constitutes persuasive authority for the result reached here.

The trustee further observes that Hoecker was decided by a divided court and urges the Court to adopt the reasoning of the dissenting judge in Hoecker. (Hoecker, 476 F.2d 838, 842 (Holloway, J. dissenting)). Judge Holloway, emphasizing the supremacy of federal law in determining what constitutes a transfer in bankruptcy cases, found that this federal interest overrides state law provisions regarding the nature and extent of property

rights. Judge Holloway concluded that the disclaimant's power to control the passing of his inheritance constituted a transfer notwithstanding the relation back provision of state law.

The court finds the Hoecker dissent to be ill-reasoned in that it disregards state law provisions defining property interests. As discussed above, in the case of a pre-bankruptcy disclaimer, the federal prohibition against fraudulent transfers is invoked when there has been a transfer of a debtor's property interest arising under state law. While the trustee argues that federal common law and the policy against fraudulent transfers should cause this Court to find that debtor's disclaimer constituted a

transfer,[3] the trustee has failed to cite any applicable provision defining debtor's interest in property other than as under state law. In the instant case, debtor had no property interest under state law that could be transferred, and debtor's disclaimer thus did not violate the fraudulent transfer provisions of the code.

The Court likewise finds the case of In re Peery, 40 B.R. 811 (Bankr. M.D.

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[3]The court of appeals in In re Detlefsen rejected a similar analysis by the district court that state laws allowing individuals to disclaim legacies and thus divert them from creditors must yield to the policies of federal bankruptcy law (see Mickelson v. Detlefsen), 466 F.Supp. 161 (D. Minn. 1979)). Detlefsen, involving a post-petition disclaimer, was decided under the Act without benefit of Sec. 541(a)(5), and there was no applicable federal provision to supersede state law in determining the debtor's property interest.

Tenn. 1984), cited by the trustee, to be unpersuasive in that the court there failed to give effect to the state law disclaimer statute in determining the debtor's interest in property. In a Sec. 727 action to deny discharge based on the debtor's pre-bankruptcy disclaimer (see 11 U.S.C. Sec. 727(a)(2)(A)), the Peery court determined that the debtor's right to receive a testamentary devise constituted a property interest under Tennessee law but essentially disregarded the relation back provision of the disclaimer statute, treating it as a statute of limitations provision rather than as affecting substantive property rights.[4] The Court finds it

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[4]The Peery court, noting that the debtor's disclaimer would not be a fraudulent conveyance under Tennessee law, recognized that the trustee would

inappropriate to look to state law for the purpose of finding a property interest in debtor but to ignore the state law provision that the interest passes, upon disclaimer, as though the debtor had predeceased the testator.

From the time of her father's death until her disclaimer, debtor here, as in Peery, had the right or power either to accept or disclaim the devise under her father's will. When debtor disclaimed the testamentary gift, this disclaimer related back to the time of the decedent's death, and debtor acquired no interest that could be made the subject of a voluntary conveyance. Tompkins

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not recover in a Sec. 544(b) action. The court expressly did not "address or decide" any issue that might be raised in an action to recover a fraudulent conveyance under Sec. 548. See Peery, 813 n. 3, 815 n.5.

State Bank v. Niles. The trustee, therefore, has no claim against defendants under Sec. 544(b), which is premised upon a state action under the fraudulent conveyance statute, and, since no federal provision applies to give debtor an interest in property other than as under state law, the trustee's action under Sec. 548(a) must likewise fail.

For the reasons stated, the Court finds that the disclaimer executed by debtor prior to filing her bankruptcy petition did not constitute a transfer of property under Secs. 548(a) and 544(b) and that Count II of the trustee's second amended complaint based on these sections should be dismissed.

IT IS ORDERED that defendants' motion to dismiss Count II of the trustee's

second amended complaint is GRANTED.

/s/ Kenneth Meyers
U.S. Bankruptcy Judge

ENTERED: July 10, 1989

2-7. Disclaimer

Sec. 2-7. Disclaimer. (a) Right to Disclaim Interest in Property. A person to whom any property or interest therein passes, by whatever means, may disclaim the property or interest in whole or in part by delivering or filing a written disclaimer as hereinafter provided. A disclaimer may be of a fractional share or undivided interest, a specifically identifiable asset, portion or amount, any limited interest or estate or any property or interest derived through right of survivorship. A power (as defined in "An Act Concerning Termination of Powers", approved May 25, 1943, as amended) with respect to property shall be deemed to be an interest in such property.

The representative of a decedent or ward may disclaim on behalf of the

decedent or ward with leave of court. The court may approve the disclaimer by a representative of a decedent if it finds that the disclaimer benefits the estate as a whole and those interested in the estate generally even if the disclaimer alters the distribution of the property, part or interest disclaimed. The court may approve the disclaimer by a representative of a ward if it finds that it benefits those interested in the estate generally and is not materially detrimental to the interests of the ward. A disclaimer by a representative of a decedent or ward may be made without leave of court if a will or other instrument signed by the decedent or ward designating the representative specifically authorizes the representative to disclaim without court approval.

The right to disclaim granted by this Section exists irrespective of any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(b) Form of Disclaimer. The disclaimer shall (1) describe the property or part or interest disclaimed, (2) be signed by the disclaimant or his representative and (3) declare the disclaimer and the extent thereof.

(c) Delivery of Disclaimer. The disclaimer shall be delivered to the transferor or donor or his representative, or to the trustee or other person who has legal title to the property, part or interest disclaimed, or, if none of the foregoing is readily determinable, shall be either delivered to a person having possession of the

property, part or interest or who is entitled thereto by reason of the disclaimer, or filed or recorded as hereinafter provided. In the case of an interest passing by reason of the death of any person, an executed counterpart of the disclaimer may be filed with the clerk of the circuit court in the county in which the estate of the decedent is administered, or, if administration has not been commenced, in which it could be commenced. If an interest in real property is disclaimed, an executed counterpart of the disclaimer may be recorded in the office of the recorder in the county in which the real estate lies, or, if the title to the real estate is registered under "An Act concerning land titles", approved May 1, 1897, as amended, may be filed in the office of the registrar of titles of such county.

(d) Effect of Disclaimer. Unless expressly provided otherwise in an instrument transferring the property or creating the interest disclaimed, the property, part or interest disclaimed shall descend or be distributed (1) if a present interest (a) in the case of a transfer by reason of the death of any person, as if the disclaimant had predeceased the decedent; (b) in the case of a transfer by revocable instrument or contract, as if the disclaimant had predeceased the date the maker no longer has the power to transfer to himself or another the entire legal and equitable ownership of the property or interest; or (c) in the case of any other inter vivos transfer, as if the disclaimant had predeceased the date of the transfer; and (2) if a future interest, as if the disclaimant had predeceased the event

which determines that the taker of the property or interest has become finally ascertained and his interest has become indefensibly fixed both in quality and quantity; and in each case the disclaimer shall relate back to such date for all purposes.

A disclaimer of property or an interest in property shall not preclude any disclaimant from receiving the same property in another capacity or from receiving other interests in the property to which the disclaimer relates.

Unless expressly provided otherwise in an instrument transferring the property or creating the interest disclaimed, a future interest limited to take effect at or after the termination of the estate or interest disclaimed shall accelerate and take effect in possession and enjoyment to the same

extent as if the disclaimant had died before the date to which the disclaimer relates back.

A disclaimer made pursuant to this Section shall be irrevocable and shall be binding upon the disclaimant and all persons claiming by, through or under the disclaimant.

(c) Waiver and Bar. The right to disclaim property or a part thereof or an interest therein shall be barred by (1) a judicial sale of the property, part or interest before the disclaimer is effected; (2) an assignment, conveyance, encumbrance, pledge, sale or other transfer of the property, part or interest, or a contract therefor, by the disclaimant or his representative; (3) a written waiver of the right to disclaim; or (4) an acceptance of the property, part or interest by the disclaimant or

his representative. Any person may presume, in the absence of actual knowledge to the contrary, that a disclaimer delivered or filed as provided in this Section is a valid disclaimer which is not barred by the preceding provisions of this paragraph.

A written waiver of the right to disclaim may be made by any person or his representative and an executed counterpart of a waiver of the right to disclaim may be recorded or filed, all in the same manner as provided in this Section with respect to a disclaimer.

In every case, acceptance must be affirmatively proved in order to constitute a bar to a disclaimer. An acceptance of property or an interest in property shall include the taking of possession, the acceptance of delivery or the receipt of benefits of the property

or interest; except that (1) in the case of an interest in joint tenancy with right of survivorship such acceptance shall extend only to the fractional share of such property or interest determined by dividing the number one by the number of joint tenants, and (2) in the case of a ward, such acceptance shall extend only to property actually received by or on behalf of the ward or his representative during his minority or incapacity. The mere lapse of time or creation of an interest, in joint tenancy with right of survivorship or otherwise, with or without knowledge of the interest on the part of the disclaimant, shall not constitute acceptance for purposes of this Section.

This Section does not abridge the right of any person to assign, convey, release, renounce or disclaim any

property or interest therein arising under any other statute or which arose under prior law.

Any interest in real or personal property which exists on or after the effective date of this Section may be disclaimed after that date in the manner provided herein, but no interest which has arisen prior to that date in any person other than the disclaimant shall be destroyed or diminished by any action of the disclaimant taken pursuant to this Section.

Amended by P.A. 83-358, Sec. 78, eff. Sept. 14, 1983; P.A. 83-426, Sec. 2, eff. Sept. 17, 1983; P.A. 83-702, Sec. 1, eff. Jan. 1, 1984; P.A. 83-1362, Art. II, Sec. 110, eff. Sept. 11, 1984.